No. 44168-3-II
Mason County Superior Court No. 12-1-00123-5

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,
Plaintiff-Appellee,
v.

TRAVIS C. BAZE,
Defendant-Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Amber L. Finley, Judge

APPELLANT'S SUPPLEMENTAL BRIEF RE: *PIATNITSKY*

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I.
INTRODUCTION

On March 26, 2014, this Court stayed Mr. Baze's appeal pending a ruling from the Washington Supreme Court in *State v. Piatnitsky*, No. 87904-4. It appeared that the Court would decide whether article I, section 9 of the Washington constitution provides greater protection against self-incrimination than the Fifth Amendment. Specifically, Piatnitsky maintained that under the state constitution, when a suspect makes an equivocal request for counsel, any further questioning must be limited to clarifying that request. The U.S. Supreme Court held in *Davis v. United States,* 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994), that there is no such requirement, at least when the suspect has already waived his *Miranda* rights. The Washington Supreme Court issued its decision in *Piatnitsky* on May 8, 2014. Unfortunately, it decided not to address the state constitution.

Pursuant to this Court's order, Baze has filed today a motion to lift the stay, and this supplemental brief. He will explain in this brief why *Piatnitksy* does not affect any of Baze's arguments regarding suppression of his statement. Baze has also filed today a motion to certify his case for direct review to the Supreme Court.

Mr. Baze has argued that his statement to the police should have been suppressed for four main reasons:

1. Baze's waiver of his right to counsel and to remain silent was invalid because the detectives qualified and contradicted the *Miranda* warning, and misled him about the availability and usefulness of a lawyer, while urging Baze to give a statement before contacting a lawyer.

2. Under the the federal constitution, when a suspect makes an equivocal request for a lawyer *before* waiving his *Miranda* rights, as Baze did, further questioning must be limited to clarifying the request. The detectives did not so limit their questioning after Baze said "do I need a lawyer?"

3. Alternatively, the above standard should apply to Baze under Article I, Section 9 of the Washington Constitution.

4. The detective's statements about the availability of a lawyer were contrary to CrR 3.1(c) and misleading, thereby making his waiver invalid.

Piatnitsky does not affect any of these arguments.

II.
ARGUMENT

A. *PIATNITSKY* DOES NOT ADDRESS THE PARTICULAR POLICE TACTICS USED IN BAZE'S CASE

In *Piatnitsky,* the defendant waived his *Miranda* rights and gave a valid confession. He then had some second thoughts about continuing to speak. *See Piatnitksy*, Slip. op. at 2-3. The issue was whether he unequivocally revoked his earlier *Miranda* waiver when he said he did not wish to talk but that he would "write it down." After being Mirandized again, and stating that he did not wish to be recorded, the detectives asked additional questions and prepared a written statement. The five-Justice majority found this to be a "conditional" and "equivocal" invocation of *Miranda*, and therefore the detectives properly continued questioning. The dissenting Justices held that Piatnitsky made an unequivocal invocation.

In Baze's case, the issues are quite different. Here, the primary question is whether the detectives misled Baze about his rights *before* he waived them. Although the detectives properly read Baze the *Miranda* warnings initially, another 15 minutes of conversation went by before Baze finally agreed to waive them. During that time, the detectives made the following improper assertions:

- If Baze asked for a lawyer he would not be able to give a statement that night. Further, a lawyer would surely tell Baze to remain silent.
- Giving a statement immediately would be in his best interest because otherwise the detectives would have to file charges the next morning without his input. They told Baze that created a "dilemma" because they would have to "error [sic] on the side of caution as to you maybe being more involved than what you are."
- Giving a prompt statement would also help Baze because judges and prosecutors valued "honesty," and that could lead to more favorable bail conditions.
- Baze would feel better after telling his story because he was a "normal person" and not a "psychopath with no conscience."

See Appellant's Opening Brief (AOB) at 7-11, 16-20; Appellant's Reply Brief (ARB) at 1-3.

Perhaps the detective's most serious violation was telling Baze that a lawyer would surely prevent him from talking. Several courts have found that such statements vitiate the *Miranda* warnings. *See* AOB at 18-19. *See also*, Baze's Statement of Supplemental Authorities (11/26/2013), citing *Lujan v. Garcia*, 734 F.3d 917, 931-32 (9th Cir. 2013) (holding that detective gave "improper, unauthorized legal advice" when he said "I

doubt that if you hire an attorney they'll let you make a statement."); *Collazo v. Estelle*, 940 F.2d 411, 414, 418 (9th Cir. 1991) (officer's advice included: "A lawyer, he's gonna say forget it. You know, don't talk to the police"; this statement "demeaned the pretrial role of counsel articulated by the Supreme Court in *Miranda*.").

B. *PIATNITSKY* DOES NOT ADDRESS WHETHER THE *ROBTOY* STANDARD APPLIES WHEN A SUSPECT MAKES AN EQUIVOCAL REQUEST FOR COUNSEL *BEFORE* WAIVING HIS *MIRANDA* RIGHTS

In earlier cases, such as *State v. Robtoy*, 98 Wn.2d 30, 653 P.2d 284 (1982), the Washington courts and other courts held that whenever a suspect makes an equivocal invocation of his right to counsel, any further discussion must focus only on clarifying the defendant's wishes. In *Davis*, supra, the U.S. Supreme Court held that questioning must cease only if the defendant unequivocally asserts his rights. *Davis*, however, involved a suspect who first made a valid waiver of his *Miranda* rights and then later questioned whether he should change his mind. Many courts have held that the standard set out in *Robtoy* continues to apply when the defendant makes an equivocal request for counsel *before* deciding to waive his *Miranda* rights. *See* State's Response Brief (SRB) at 18-20; ARB at 4-12. The State concedes that Baze's statement, "Do I need a lawyer?" was made before he waived his *Miranda* rights. SRB at 18.

This issue did not arise in *Piatnitsky* because the defendant waived his *Miranda* rights and gave a confession, but then had some second thoughts about continuing to speak. *See Piatnitksy*, Slip. op. at 2-3. It remains an open question in Washington.

C. BECAUSE *PIATNITKSY* DID NOT ADDRESS THE STATE CONSTITUTIONAL ISSUE, IT SHOULD BE ADDRESSED IN THIS CASE

Baze's briefing on this issue is in the Appellant's Opening Brief at 23-33 and Appellant's Reply Brief at 14. The thrust of his argument is that Washington should return to the standard it applied in *State v. Robtoy*, regardless of whether the *Davis* standard would apply under federal law.

The Washington Supreme Court declined to address that issue because "Piatnitsky did not raise this argument at trial, at the Court of Appeals, or in his petition for discretionary review. We decline to reach it. *See* RAP 13.7(b); *State v. Radcliffe,* 164 Wn.2d 900, 907, 194 P.3d 250 (2008)." This decision is somewhat surprising since the Supreme Court, on its own motion, ordered briefing on the issue even though neither party had raised it. It is true, however, that RAP 13.7(b) generally prohibits consideration of issues in the Supreme Court which were not raised in the petition for review.

In any event, the same concerns do not apply here. RAP 2.5(a) permits the Court to accept issues raised for the first time on appeal, and

requires review regarding manifest error affecting a constitutional right. Although Mr. Baze did not expressly cite to the state constitution in the trial court, he did clearly argue that the *Robtoy* standard should apply. *See, e.g.*, I RP 55-56. Further, the Court issued findings and conclusions based on that standard. *See* CP 172-177; Conclusion of Law 5 and 6 (finding that Baze's request for counsel was "equivocal at best" and that the detectives then limited their questioning to clarifying Baze's wishes.) Both sides have addressed the state constitutional issue in their briefing.[1]

D. *PIATNITSKY* DOES NOT ADDRESS CRR 3.1(C)

In addition to his constitutional issues, Baze has raised a violation of court rule CrR 3.1(c). *See* AOB at 21-23; ARB at 13-14. *Piatnitsky* does not address the court rule.

III.
CONCLUSION

Although it appeared that *Piatnitsky* would shed light on Baze's case, it has not done so. The State constitutional issue is still open. Baze's case also raises another issue of first impression: whether the

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[1] Even when a state constitutional issue is not addressed at all in the trial court it can be reviewed on appeal if both sides have a fair opportunity for briefing. *See State v. Hendrickson*, 129 Wn.2d 61, 70 n.1, 917 P.2d 563 (1996) (deciding case under article I, section 7 even though petitioner raised the state constitution for the first time in his supplemental brief.).

Robtoy or *Radcliffe* standard applies when a suspect makes an equivocal request for counsel before waiving his *Miranda* rights.

DATED this 2nd day of June, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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